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FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6868

DATE COMPLAINT FILED: September 11, 2014

DATE OF NOTIFICATION: September 18, 2014

LAST RESPONSE RECEIVED: October 9, 2014

DATE ACTIVATED: January 29, 2015

EXPIRATION OF SOL:

August 27, 2019 (earliest)

September 10, 2019 (latest)

ELECTION CYCLE: 2014

COMPLAINANT: Stephen P. Roberts

RESPONDENTS: Vincent Harris •
Harris Media, LLC

RELEVANT STATUTE
AND REGULATION: 52 U.S.C. § 30124(a)¹
11 C.F.R. § 110.16

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

Complainant Stephen P. Roberts alleges that Vincent Harris and Harris Media, LLC (collectively "Harris Media" or "Respondents") fraudulently misrepresented the Committee to Elect Vance McAllister ("Committee") in connection with its website, Twitter feed, and YouTube channel.² See 52 U.S.C. § 30124 (formerly 2 U.S.C. § 441h) and 11 C.F.R. § 110.16. As discussed below, because the available information does not indicate that Respondents fraudulently misrepresented themselves as acting on behalf of McAllister on a matter damaging

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended (the "Act"), was transferred from Title 2 to new Title 52 of the United States Code.

² The Complainant is outside counsel to the Committee to Elect Vance McAllister. See Compl. at 1 (Sept. 11, 2014).

to McAllister, we recommend that the Commission find no reason to believe that Respondents violated 52 U.S.C. § 30124(a) (formerly 2 U.S.C. § 441h(a)) and close the file.

II. FACTS

Vance McAllister was a candidate for the U.S. House of Representatives from Louisiana's Fifth Congressional District in a 2013 special election and during the 2014 election cycle.³ The Committee is McAllister's principal campaign committee. During the 2013 special election, the Committee used Harris Media as one of its vendors.⁴ Sometime after the November 16, 2013, special election, the Committee and Harris Media disagreed whether the Committee owed Harris Media additional fees for its services. Compl. at 2; Harris Media Response ("Resp.") at 1 (Oct. 9, 2014). Both the Complaint and Response acknowledge that Harris Media, which had control over the Committee's social media accounts, refused to transfer account access for these services to McAllister until Harris Media received what it believed to be full payment. Compl. at 2, 3; Resp. at 2.

The Committee requested that Harris Media relinquish control of the accounts in a series of emails dated August 27, September 5, and September 8, 2014, and during a telephone conversation on September 3, 2014.⁵ Compl. at 2. In these communications, the Committee

³ McAllister won the November 16, 2013, special election to fill the remainder of the term of Rep. Rodney Alexander, who resigned his seat. McAllister finished fourth in the primary election on November 4, 2014, and finished his term January 3, 2015.

⁴ Compl. at 1. The Committee's disclosure reports identify four payments to Harris Media for that election: \$1,030.32 on September 10, 2013, for "Website Domain"; \$4,000.00 on November 18, 2013, for "Web Design & Development"; \$8,616.94 on November 18, 2013 for "Run Off GOTV Advertising"; and \$303.96 on April 12, 2014, for "Online Fundraising Applications." See Amended 2013 12-Day Pre-Special Report (Dec. 12, 2013) at 15, Amended 2013 30-Day Post-Runoff Report (Aug. 8, 2014) at 45, 46, and Amended 2014 July Quarterly Report (Aug. 8, 2014) at 14.

⁵ The Committee's Amended 2014 July Quarterly Report reflects an additional payment of \$15 to Harris Media for "Website Maintenance" made on April 12, 2014, in connection with the 2014 primary election. *Id.* at 14. As such, it appears that Harris Media was still providing services to the Committee after the November 16, 2013, special election.

1 alleged that Harris Media had engaged in "unauthorized communications and requested that
2 [Harris] cease fraudulently misrepresenting his communications as the candidate's." *Id.* The
3 Complaint alleges that "a federal candidate's own inability to control the message it is presumed
4 to be making is inherently damaging," and the contrast between Harris Media's "unauthorized
5 communications" and McAllister's new 2014 website and Twitter feed might confuse voters. *Id.*
6 at 3-4.

7 Harris Media asserts that the content on the website and social media accounts "remained
8 static since the November 2013 special election, with no new content having been added or
9 transmitted, and with all existing content having been prepared for, approved and authorized by
10 McAllister." Resp. at 2. Harris Media says it removed the website
11 www.mcallisterforcongress.com on September 8, 2014, and "subsequently transferred the login
12 information and passwords for the website and social media sites to McAllister." Resp. at 2.
13 Harris Media states that these actions reflected an attempt to resolve the matter with McAllister,
14 not a recognition of the Complaint's alleged violation of the Act.⁶ *Id.*

15 III. ANALYSIS

16 The Act prohibits federal candidates and their employees or agents from fraudulently
17 misrepresenting themselves, or any other organization under the candidate's control, as speaking
18 or otherwise acting on behalf of any other candidate or political party on a matter that is
19 damaging to such other candidate or party. 52 U.S.C. § 30124(a)(1) (formerly 2 U.S.C.
20 § 441h(a)(1)); 11 C.F.R. § 110.16(a)(1).

⁶ The Committee disclosed a \$5,000 debt owed to Harris Media during 2014, *see, e.g.*, 2014 April Quarterly Report (Apr. 15, 2014) at 37, 2014 October Quarterly Report (Oct. 15, 2014) at 53, but the Committee's 2014 30-Day Post-General Report reveals a \$0 debt balance with an explanation on its "FEC Miscellaneous Text Related to a Report, Schedule or Itemization," noting that the "Previous debt amount of \$5,000 to Harris Media, LLC has been determined by both parties to not be due. No in-kind contribution results from removal of debt." *See* 2014 30-Day Post-General Report (Dec. 4, 2014) at 50, 51. It is unclear whether this debt and the disputed monies identified in this matter are one in the same.

1 To violate 52 U.S.C. § 30124(a) (formerly 2 U.S.C. § 441h(a)), the Act requires that the
2 violator have the intent to deceive, but does not require that the violator sustain all elements of
3 common law fraud. "Unlike common law fraudulent misrepresentation, 2 U.S.C. § 441h(a)
4 gives rise to no tort action..." and therefore, proof of justifiable reliance and damages is not
5 necessary. *See Explanation and Justification of 11 C.F.R. § 110.16*, 67 Fed. Reg. 76,962, 76,969
6 (Dec. 13, 2002); *Neder v. United States*, 527 U.S. 1, 24-25 (1999) (citing *United States v.*
7 *Stewart*, 872 F.2d 957, 960 (10th Cir. 1989)). The Commission has determined that the statutory
8 language "on a matter that is damaging" includes actions or spoken or written communications
9 that are intended to suppress votes for the candidate or party who has been fraudulently
10 misrepresented. *See Explanation and Justification of 11 C.F.R. § 110.16*, 67 Fed. Reg. 76,962,
11 76,968-69 (Dec. 13, 2002). While the precise harm may be difficult to quantify, harm is
12 presumed from the nature of the communication. *Id.* at 76,969. Proof of financial damages is
13 unnecessary.⁷ *Id.*

14 Neither the Act nor the Commission's regulations includes a general definition of
15 "agent." The Commission, however, has defined the term "agent" in regulations addressing
16 coordinated and independent expenditures and the soft money ban as "any person who has actual
17 authority, either express or implied." *See* 11 C.F.R. §§ 109.3, 300.2(b). The Commission has
18 explained that "actual authority is created by manifestations of consent (express or implied)

⁷ The fraudulent misrepresentation prohibition currently found at 52 U.S.C. § 30124(a) (formerly 2 U.S.C. § 441h(a)) was enacted into law through the 1974 amendments to the Act as part of the legislative response to the problem of "dirty tricks" illuminated in the Senate Watergate hearings. When introducing the provision as an amendment to Senate Bill 3044, Senator Birch Bayh cited as an example of the activity at which the provision was aimed, incidents involving Donald Segretti, an agent of President Nixon's 1972 reelection campaign committee. Bayh specifically referenced Segretti's distribution of a document on the campaign letterhead of Senator Muskie, a candidate seeking the Democratic presidential nomination, containing false accusations against two other Democratic candidates. *Legislative History of Federal Election Campaign Act Amendments of 1974*, at 521 (statement of Senator Birch Bayh, April 11, 1974). The purpose of this false document and of other "dirty tricks" orchestrated by Segretti was to create dissension among the candidates for the Democratic presidential nominee. *See U.S. v. Chapin*, 515 F.2d 1274, 1277 (D.C. Cir. 1975).

1 made by the principal to the *agent*.” See 71 Fed. Reg. at 4976 (citing Restatement (Second) of
2 Agency § 710 (1958)) (emphasis in original). The Commission has recognized that “. . . a
3 person may be an agent as a result of actual authority based on his or her position or title within a
4 campaign organization, political party committee, or other political committee.” 71 Fed. Reg. at
5 4978. A candidate need not explicitly instruct an agent to perform a particular activity on his or
6 her behalf because actual authority can be established by implication. *Id.* (stating that the
7 definition “capture[s] actions by individuals acting under indirect signals from a candidate”).
8 Thus, the Commission’s determination turns on the particular facts.

9 The record here does not provide a reasonable basis to believe that Respondents made
10 fraudulent misrepresentations in violation of the Act. The Complaint alleges that Harris Media is
11 an agent of a federal candidate for purposes of Section 30124(a) liability based on its web
12 consulting for the campaign committees of Senator Mitch McConnell and Representative Jackie
13 Walorski.⁸ Compl. at 3. The Complaint, however, does not allege, and the available information
14 does not indicate, that Harris Media was acting as an agent of McConnell or Walorski when it
15 refused to grant the Committee access to its internet accounts and thereby allegedly caused
16 damage to McAllister.⁹ See 71 Fed. Reg. at 4976 (citing Restatement (Second) of Agency § 710
17 (1958)).

18 Further, the alleged activity in this matter does not rise to the level of “fraudulent
19 misrepresentation.” McAllister approved and authorized the 2013 materials under Harris
20 Media’s control. The Complaint does not allege, and the available information does not suggest,

⁸ McConnell is a U.S. Senator from Kentucky; Walorski is a U.S. Representative from Indiana’s Second District.

⁹ One of McAllister’s opponents in the 2014 election, Zach Dasher, also used Harris Media as a vendor. See, e.g., Friends of Zach Dasher 2014 October Quarterly Report (Oct. 15, 2014) at 85 (\$10,881.64 on August 29, 2014, for “Online Advertising”).

1 that Harris Media changed any of the material. McAllister argues that his inability “to control
2 the message”¹⁰ is sufficiently damaging to constitute a Section 30124(a) violation, but this statute
3 appears to target actions such as vote suppression. *See Explanation and Justification of*
4 *11 C.F.R. § 110.16*, 67 Fed. Reg. at 76,968-69. For example, in MUR 4919 (Charles Ball for
5 Congress), the Commission determined that the Respondents, a Republican candidate committee
6 and the campaign manager, violated 2 U.S.C. § 441h based in part upon the actions they took to
7 make a mailer and phone calls look like they came from the local Democratic Party when in fact
8 they came from the Republican candidate committee.¹¹ The communications were damaging
9 because they told recipients, who were registered Democrats, not to vote for the Democratic
10 candidate in an election that was just days away.¹² In contrast, Harris Media, rather than
11 fraudulently misrepresenting itself as acting on behalf of McAllister on a matter damaging to
12 McAllister while acting as an agent of another federal candidate, appears to have withheld access
13 to the Committee’s website and social media accounts to obtain leverage in a contract dispute,
14 which appears to have been resolved when Harris Media returned access to the Committee after
15 the Complaint was filed.

16 Accordingly, we recommend that the Commission find no reason to believe that Vincent
17 Harris or Harris Media LLC violated 52 U.S.C. § 30124(a) (formerly 2 U.S.C. § 441h(a)). We
18 also recommend that the Commission close the file.

¹⁰ See Compl. at 3.

¹¹ See Factual and Legal Analyses, MUR 4919 (Charles Ball for Congress; Adrian Plesha) (“MUR 4919 F&LAs”). The Commission found probable cause to believe that these respondents violated 2 U.S.C. § 441h. *See* Certification, MUR 4919 (June 21, 2002).


¹² See MUR 4919 F&LAs.


IV. RECOMMENDATIONS

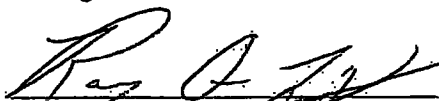
1. Find no reason to believe that Vincent Harris or Harris Media, LLC violated 52 U.S.C. § 30124(a) (formerly 2 U.S.C. § 441h(a)).
2. Approve the attached Factual and Legal Analysis.
3. Approve the appropriate letters.
4. Close the file.

3/13/15

Date


Stephen Gira
Deputy Associate General Counsel
for Enforcement


Mark Allen
Acting Assistant General Counsel


Roy Q. Lockett
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